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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CHAILLE WEAVER,

Plaintiff and Appellant,

v.

HEALTHCOMP, INC.,

Defendant and Respondent.

F075072

(Super. Ct. No. 15CECG00163)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Mark Wood Snauffer, Judge.

Bryant Whitten and Amanda B. Whitten for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Steven M. McQuillan and Todd W. Baxter for Defendant and Respondent.

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Plaintiff appeals from the judgment entered after the trial court granted defendant's motion for summary judgment. The motion was granted on the ground plaintiff's causes of action under California law for invasion of privacy and unfair business practices were preempted by federal law. We find no error in the trial court's ruling and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Debora Rose[1] was a former employee of Harris Ranch Beef Company (Harris Ranch). Harris Farms, Inc. (Harris Farms) created the Harris Farms Inc. Employee Health Care Plan (the plan), a self-insured employee health benefits plan for employees of Harris Farms and its related companies, including Harris Ranch. The plan is administered in accordance with the Employee Retirement Income Security Act (ERISA). (29 U.S.C. § 1001 et seq.). Harris Farms is the health plan administrator and sponsor. Defendant, HealthComp, Inc., acts as the third-party administrator for the plan; its services include case management.

In December 2011, Rose was diagnosed with liver failure; her health care providers told her she needed a liver transplant and placed her on the transplant waiting list. Defendant assigned Rose a nurse case manager to help her navigate the medical process. Rose alleged the nurse case manager had Rose sign a form authorizing release of medical records, and the nurse case manager passed along to Rose's employer medical information she received using the signed authorization. In December 2012, Harris Ranch terminated Rose's employment; Rose alleged this occurred shortly after Harris Ranch received a report from the nurse case manager about Rose's increased need for a liver transplant. Rose alleged defendant closed the nurse case management file after Rose's termination but reopened it at Harris Ranch's request after Rose filed a wrongful termination action against Harris Ranch. Defendant allegedly resumed accessing Rose's medical records via the release and supplying her medical information to Harris Ranch.

Plaintiff's complaint alleged two causes of action: (1) invasion of privacy in violation of California Constitution, article I, section 1, and Civil Code section 56.20; and

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1 Rose was the original plaintiff. While this action was pending in the trial court, Rose died (on July 24, 2016). Thereafter, her daughter, Chaille Weaver, filed a motion to continue this action as her mother's successor in interest pursuant to Code of Civil Procedure section 377.31, and the trial court granted the motion.

(2) unfair business practices in violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Both causes of action were premised on defendants' alleged improper disclosure or use of plaintiff's personal health information. Defendants moved for summary judgment, asserting plaintiff's two state law causes of action were preempted by ERISA, pursuant to 29 United States Code section 1144(a). Plaintiff opposed the motion. The trial court granted defendants' motion and entered judgment in defendants' favor. Plaintiff appeals.

DISCUSSION

I. Standard of Review

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On appeal, "we apply the same three-step analysis required of the trial court: We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue." (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836 (*Torres*).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

"A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119.) The evidence of the party opposing the motion must be

liberally construed, and that of the moving party strictly construed. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 308.) We do not consider evidence to which objections have been made and sustained. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) If the appellant challenges the trial court's rulings on evidentiary objections, however, we review them for abuse of discretion. (*Walker v. Countrywide Home Loans, Inc*. (2002) 98 Cal.App.4th 1158, 1169 (*Walker*).)

On appeal, the judgment is presumed correct and the appellant bears the burden of affirmatively demonstrating error. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.)

II. ERISA Preemption

A. Overview

" 'ERISA is a comprehensive federal statutory scheme designed to promote the interests of employees and their beneficiaries in employee benefit plans.' [Citations.] It 'sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans.' " (*Betancourt v. Storke Housing Investors* (2003) 31 Cal.4th 1157, 1163 (*Betancourt*).) ERISA "does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans …. It envisions administrative oversight, imposes criminal sanctions, and establishes a comprehensive civil enforcement scheme. [Citation.] It also pre-empts some state law." (*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*. (1995) 514 U.S. 645, 651 (*Travelers*).)

Courts must address " 'claims of pre-emption with the starting presumption that Congress does not intend to supplant state law,' in particular state laws regulating a subject of traditional state power. [Citation.] ERISA, however, 'certainly contemplated the pre-emption of substantial areas of traditional state regulation.' " (*Gobeille v. Liberty Mut. Ins. Co*. (2016) 577 U.S. ___ [194 L.Ed.2d 20, 136 S.Ct. 936, 946] (*Gobeille*).) To

determine whether a state law[2] is preempted by ERISA, "the text of ERISA's express pre-emption clause is the necessary starting point." (*Gobeille*, at p. 943.) The express preemption clause states that ERISA's provisions "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by ERISA. (29 U.S.C. § 1144(a), italics added.) "[A] state law relates to an ERISA plan 'if it has a *connection with* or *reference to* such a plan.' " (*Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 147 (*Egelhoff*), italics added.)

A state law has reference to an ERISA plan "[w]here a State's law acts immediately and exclusively upon ERISA plans, … or where the existence of ERISA plans is essential to the law's operation." (*California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997) 519 U.S. 316, 325.) There is no contention that the state constitutional provision or laws on which plaintiff bases her claims have direct reference to ERISA plans. Consequently, like the trial court, we consider whether the state provisions have a connection with the ERISA plan.

"Acknowledging that 'connection with' is scarcely more restrictive than 'relate to,' [the United States Supreme Court has] cautioned against an 'uncritical literalism' that would make preemption turn on 'infinite connections.' [Citation.] Instead, 'to determine whether a state law has the forbidden connection, we look both to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," as well as to the nature of the effect of the state law on ERISA plans.' " (*Egelhoff, supra*, 532 U.S. at p. 147.) A state law has an impermissible connection with ERISA plans if it " 'governs … a central matter of plan administration' or 'interferes with nationally uniform plan administration.' " (*Gobeille*, *supra*, 136 S.Ct. at p. 943.) Additionally, "state laws providing alternative enforcement mechanisms also relate to

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2 "State law" is defined broadly to include "all laws, decisions, rules, regulations, or other State action having the effect of law." (29 U.S.C. § 1144(c)(1); *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 138–139 (*Ingersoll-Rand*).)

ERISA plans, triggering pre-emption." (*Travelers*, *supra*, 514 U.S. at p. 658.) " 'The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. … [¶] The deliberate care with which ERISA's civil enforcement remedies [in 29 United States Code section 1132(a)] were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.' " (*Betancourt*, *supra*, 31 Cal.4th at pp. 1164–1165.)

B. Objectives of ERISA Statutes

In determining whether the state laws on which plaintiff's claims are based have an impermissible connection with an ERISA plan, we first consider "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." (*Egelhoff*, *supra*, 532 U.S. at p. 147.) "ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits. [Citation.] The 'comprehensive and reticulated statute,' [citation] contains elaborate provisions for the regulation of employee benefit plans. It sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits." (*Massachusetts v. Morash* (1989) 490 U.S. 107, 112–113 (*Morash*).)

"The basic thrust of the pre-emption clause … was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." (*Travelers*, *supra*, 514 U.S. at p. 657.) The breadth of the preemption provision indicated "Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern.' " (*Id.* at p. 656; *Ingersoll-Rand*, *supra*, 498 U.S. at p. 138.) "Congress intended 'to ensure that plans and plan sponsors would be subject to

a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government …, [and to prevent] the potential for conflict in substantive law … requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.' " (*Travelers, supra*, at pp. 656–657.) "Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement." (*Ingersoll-Rand, supra*, at p. 142.)

C. State Laws in Issue

Plaintiff's first cause of action alleges violation of her privacy rights under the California Constitution, article I, section 1, and Civil Code section 56.20. California Constitution, article I, section 1, provides in pertinent part: "All people … have inalienable rights. Among these are … pursuing and obtaining … privacy." The provision protecting privacy was intended to be self-executing; it creates a right of action against private, as well as governmental, entities. (*Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 74; *Gunn v. Employment Development Dept.* (1979) 94 Cal.App.3d 658, 663.) One type of privacy interest the constitutional provision protects is the interest in precluding the dissemination or misuse of sensitive and confidential information. (*Hill, supra*, at p. 35.)

Civil Code section 56.20 requires employers who receive medical information of their employees to "establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of that information." (Civ. Code, § 56.20, subd. (a).) It also provides that "No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer

possesses pertaining to its employees without the patient having first signed an authorization … permitting such use or disclosure." (Civ. Code, § 56.20, subd. (c).)[3] An exception permits the information to be used "only for the purpose of administering and maintaining employee benefit plans, including health care plans." (Civ. Code, § 56.20, subd. (c)(3).)

Plaintiff's second cause of action alleges unfair business practices (Bus. & Prof. Code, § 17200 et seq.). Plaintiff alleges the unfair practices included violations of unspecified provisions of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA; Pub.L. No. 104–191 (Aug. 21, 1996) 110 Stat. 1936), and California's Confidentiality of Medical Information Act (Civ. Code, § 56 et seq.), Patient Access to Health Records Act (Health & Saf. Code, § 123100 et seq.), and Fair Employment and Housing Act (Gov. Code, § 12920 et seq.). The second cause of action alleges that defendant exceeded the scope of plaintiff's authorization for release of medical records and disseminated information to her employer without her informed consent. Plaintiff has not cited us, either in her complaint or in her briefs, to any provisions of these statutes that she contends defendant violated. Plaintiff's appellate briefs address only the constitutional provision and Civil Code section 56.20; they contain no argument concerning the state laws mentioned in the second cause of action, or the nature of the effect of these state laws on ERISA plans.

D. Analysis

ERISA and regulations promulgated under it and under HIPAA, which is part of ERISA (*Fossen v. Blue Cross & Blue Shield of Montana, Inc.* (9th Cir. 2011) 660 F.3d

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3 Civil Code section 56.20, by its terms, applies to employers. The complaint does not allege defendant was plaintiff's employer; rather, it alleges (and the undisputed facts established) defendant was the third-party administrator of her employer's health care plan. The complaint does not allege a violation of Civil Code section 56.26, which governs disclosures of medical information by entities "engaged in the business of furnishing administrative services to programs that provide payment for health care services." (Civ. Code, § 56.26, subd. (a).)

1102, 1106), contain provisions regarding the responsibilities of fiduciaries of ERISA group health plans, as well as provisions describing the health information that may be obtained and disclosed by those involved in the plan. (29 U.S.C. §§ 1101–1114, 1191c; 45 C.F.R. §§ 160, 162, 164 (2018).) The regulations define "protected health information," and require that an ERISA group health plan include and implement specified privacy provisions. (45 C.F.R. §§ 160.103 [definitions of "group health plan" and "protected health information"], 164.504(f) (2018).)

The main purpose of ERISA's preemption provision was to provide for a single, uniform body of law governing employee benefit plans, to minimize the administrative and financial burden of complying with potentially conflicting state laws. (*Travelers*, *supra*, 514 U.S. at pp. 656–657.) Preemption applies even if the state law is consistent with ERISA's substantive requirements. (*Ingersoll-Rand*, *supra*, 498 U.S. at p. 139.) Permitting state law to dictate what disclosures of protected health information are permitted and what remedies exist for impermissible disclosures would interfere with and undermine the uniform system of regulation set up by ERISA. Plan administrators would have to consult the law of each state to determine the obligations and restrictions applicable to such disclosures. Consequently, the state laws plaintiff invokes have an impermissible connection with ERISA plans, because they set up alternative or additional restrictions on disclosure of private information and thereby would interfere with nationally uniform plan administration; they are therefore preempted. (*Gobeille*, *supra*, 136 S.Ct. at p. 943.)

Further, they are preempted because they provide alternative enforcement mechanisms. (*Travelers*, *supra*, 514 U.S. at p. 658.) ERISA authorizes equitable relief for violations of ERISA and for enforcement of the provisions of ERISA and the terms of the plan. (29 U.S.C. § 1132(a)(3).) Plaintiff seeks additional remedies, including monetary damages, under state law. "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear

congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." (*Aetna Health Inc. v. Davila* (2004) 542 U.S. 200, 209.) Plaintiff's causes of action under state law are preempted on this basis as well.

In *Darcangelo v. Verizon Communications, Inc*. (4th Cir. 2002) 292 F.3d 181 (*Darcangelo*), an employee sued her employer (Verizon) and the third-party administrator of Verizon's disability benefits plan, alleging violations of a state medical record confidentiality statute and a state unfair and deceptive trade practices statute, as well as common law torts. (*Id*. at p. 186.) The case presented issues of pleading and jurisdiction, and the court addressed only the allegations of the complaint. (*Id*. at pp. 186, 195.) The complaint alleged the administrator, acting as agent of Verizon, without the plaintiff's consent or any justification, solicited from her medical providers personal and confidential information about her mental health condition and treatment, and disseminated it to Verizon, to assist Verizon in terminating her employment. (*Id*. at pp. 186, 188.) Apparently, the plaintiff believed Verizon had been planning to fire her, but Verizon feared liability under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.). (*Darcangelo, supra*, at p. 188.) She alleged the administrator disseminated the medical information to Verizon to assist it in establishing that she posed a direct threat to her coworkers, which would provide a defense to an ADA claim. (*Ibid*.)

The court stated that, if the third-party administrator obtained the plaintiff's medical information in the course of processing a benefits claim or performing any of its administrative duties under the plan, the state claims would be related to the ERISA plan and therefore preempted. (*Darcangelo, supra,* 292 F.3d at p. 188.) However, if the administrator "was not performing any of its duties as plan administrator, but obtained the information solely to assist Verizon in establishing that [the plaintiff] posed a threat to her coworkers," then her state claims would not be related to the plan. The court read the complaint "as alleging that [the administrator] solicited her private medical information

for the *sole* purpose of helping Verizon establish that she posed a sufficient threat to her coworkers to warrant her discharge." (*Ibid*.)

The court stated: "[T]he Supreme Court has explained that Congress intended to preempt at least three categories of state law under § 514 [29 U.S.C. § 1144]: (1) laws that mandate employee benefit structures or their administration, (2) laws that bind employers or plan administrators to particular choices or preclude uniform administrative practices, and (3) laws that provide alternative enforcement mechanisms to ERISA's civil enforcement provisions." (*Darcangelo, supra,* 292 F.3d at p. 190.) The first category did not apply because the plaintiff's "claims for relief do not rely on any state law that dictates 'the terms of a plan or the type of benefits a plan may provide,' imposes 'reporting, disclosure or funding requirements,' or 'affects calculation of benefits.' " (*Ibid*.) As to the second category, "[b]ecause she alleges conduct that is entirely outside the scope of plan administration, she does not make any claim for relief that would regulate the structure or process of plan administration." (*Ibid*.)

The court concluded the third category also did not apply. Prior cases finding preemption on this ground "involved alleged misconduct by an administrator that was clearly undertaken in the course of carrying out duties under a plan." (*Darcangelo, supra,* 292 F.3d at p. 191.) The court noted run-of-the-mill tort causes of action are not automatically preempted just because a defendant is an ERISA plan administrator and the claim is by a plan participant or beneficiary. (*Darcangelo,* at pp. 191–192.) The court rejected Verizon's argument the plaintiff's claims were preempted because she was attempting to enforce the fiduciary requirements of ERISA and the ERISA plan. It concluded the alleged misconduct was outside the administrator's fiduciary duties under the plan. (*Darcangelo,* at p. 192.) If the plaintiff alleged the administrator, "*in the course of processing a benefits claim or performing some other plan duty,* improperly disclosed her private medical information, this would be a claim for breach of fiduciary duty under ERISA." (*Id.* at p. 193.) But because the complaint alleged the administrator

did not obtain the information in pursuit of a legitimate or appropriate end, it essentially alleged the administrator "undertook conduct that was entirely unrelated to and outside the scope of [its] duties under the plan or in carrying out the terms of the plan." (*Ibid.*) Such action did not threaten the uniformity of plan administration or implicate the relationship among traditional ERISA plan entities with respect to their functions, so the plaintiff's claims would not undermine the congressional policies that underlie ERISA. (*Darcangelo*, at p. 194.) The court concluded the plaintiff's "claims are not an attempt to enforce her rights under ERISA or the ERISA plan and therefore are not alternative enforcement mechanisms to" the ERISA remedies; thus, they were not preempted. (*Darcangelo*, at p. 194.)

The court emphasized its ruling was based only on the allegations of the complaint. It did "not rule out the possibility that further factual development, perhaps in summary judgment proceedings, might establish that" the plaintiff's state law claims were preempted. (*Darcangelo*, *supra*, 292 F.3d at p. 195.)

In analyzing the trial court's ruling on defendant's motion for summary judgment, we first review the allegations of the complaint; it was these allegations defendant was required to address in its motion. (*Torres*, *supra*, 3 Cal.App.4th at p. 836.) Plaintiff attempted to allege a claim, like Darcangelo's, that defendant, the third-party administrator of the plan, "undertook conduct that was entirely unrelated to and outside the scope of [its] duties under the plan or in carrying out the terms of the plan." (*Darcangelo*, *supra*, 292 F.3d at p. 193.) She alleged defendant used a nurse case manager to obtain her personal health information by having plaintiff sign an authorization to release her medical information, without disclosing the information would be shared with plaintiff's employer. Plaintiff alleged defendant disclosed the information it obtained to her employer. The information allegedly indicated plaintiff had an increasing need for a liver transplant, and after the employer received the

information, it terminated her employment. The complaint implied her employer terminated plaintiff's employment to avoid the cost of an expensive liver transplant.

The complaint did not allege defendant improperly disclosed any information to plaintiff's employer for the purpose of having her employment terminated; it did not allege defendant participated in, or assisted the employer in, the termination of her employment. Unlike the complaint in *Darcangelo*, plaintiff's complaint did not allege conduct of defendant entirely outside the scope of plan administration; it did not allege defendant obtained, disclosed, or used plaintiff's protected health information in pursuit of an illegitimate or inappropriate end that caused defendant's conduct to be unrelated to and outside the scope of its duties to the plan or it duties in carrying out the terms of the plan.

We next consider defendant's showing in support of its motion for summary judgment. To demonstrate ERISA preemption of plaintiff's claims, defendant's motion presented facts, which plaintiff did not dispute, showing that the plan is a "self-funded employee health care plan established and maintained by Harris Farms Inc. to provide health benefits" to its employees in accordance with ERISA. Harris Farms is identified in the plan as the plan sponsor and the plan administrator. The plan administrator is authorized by the plan documents to appoint a claims administrator to pay all claims, and to delegate to others such powers, duties, and responsibilities as it deems appropriate.

Defendant also submitted facts showing Harris Farms, the plan administrator, contracted with defendant for defendant to act as the third-party administrator and perform many administrative functions for the plan. The evidence indicated case management was a benefit provided for in the plan.

To enable the plan administrator to perform its services for the plan, some members of its workforce were expressly authorized by the plan documents to have access to the protected health information of the plan participants and beneficiaries. The plan documents provided which employees were allowed access to that information and

for what purposes. Plaintiff's complaint did not allege defendant disclosed any protected health information to anyone who was not on the list of those authorized by the plan documents to receive it.

Plaintiff contended, in opposition to defendant's motion, that her protected health information was obtained and disclosed by the nurse case manager in the course of case management; she argued case management was separate from and not a part of the benefits of the plan, and therefore was not covered by ERISA. Case management, however, is expressly provided for in the plan, which is governed by ERISA.

Plaintiff's opposition to the motion also challenged the amount of information disclosed by the case manager, who was an employee of defendant. Plaintiff contended defendant was only authorized to disclose the minimum information necessary to accomplish the purpose of the disclosure; she also asserted defendant was only authorized to disclose summary health information, which excluded information identifying the individual who was the subject of the health information.

At best, plaintiff's opposition to defendant's motion for summary judgment raised triable issues of material fact regarding whether defendant improperly obtained or disclosed her private medical information in the course of processing her claim for benefits or performing other plan duties, such as providing information to the plan administrator to enable it to perform its functions under the plan. Privacy regulations, applicable to health benefit plans and incorporated into the plan, include comprehensive provisions concerning obtaining, protecting, and disclosing plan participants' protected health information. (45 C.F.R. § 164 (2018).) The issues presented by plaintiff's action concerned the third-party administrator obtaining and disclosing information in the course of handling plaintiff's claim for benefits under an ERISA employee benefits plan. *Darcangelo* indicates plaintiff's claims are preempted because she alleged misconduct that was undertaken in the course of carrying out defendant's administrative duties under the plan, and because plaintiff's claims sought an alternative mechanism of enforcement

of her privacy rights as a participant in the plan. (See *Darcangelo, supra*, 292 F.3d at p. 191.) Additionally, allowing pursuit of plaintiff's state law claims would undermine the nationally uniform administration of ERISA plans; it would require plan administrators to determine the privacy laws of each state, and in each state, ensure that the provisions of the plan and the conduct of those involved in plan administration complied with the laws of the relevant state as well as the requirements of ERISA. Consequently, plaintiff's claims under the state law provisions alleged in this case are preempted by ERISA.

Plaintiff relied heavily on *Dishman v. UNUM Life Ins. Co. of America* (9th Cir. 2001) 269 F.3d 974 (*Dishman*), in support of her argument that her claims are not preempted. *Dishman*, like *Darcangelo*, is distinguishable, however. In *Dishman*, the plaintiff applied for and received long-term disability benefits from his employer's ERISA plan. (*Dishman*, at pp. 977–978.) Although there was strong evidence of the validity of the plaintiff's claim, the insurance company providing the benefits began reinvestigating the claim and terminated the plaintiff's benefits. (*Id.* at p. 978.) The plaintiff sued the insurer, alleging that, under California law, the insurer was "vicariously liable for the tortious invasion of privacy perpetrated by the several investigative firms it hired." (*Id.* at p. 979.) The complaint alleged "that an investigator retained by UNUM elicited information about [the plaintiff's] employment status by falsely claiming to be a bank loan officer endeavoring to verify information he had supplied; that investigators elicited personal information about him from neighbors and acquaintances by representing that he had volunteered to coach a basketball team; that investigators sought and obtained personal credit card information and travel itineraries by impersonating him; that investigators falsely identified themselves when caught photographing his residence; and that investigators repeatedly called his residence and either hung up or else dunned the person answering for information about him." (*Dishman, supra*, 269 F.3d at

pp. 979–980.) The defendant contended the plaintiff's state claim was preempted by ERISA. (*Dishman*, at pp. 979–980.)

The court noted " 'the basic thrust of the pre-emption clause … was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.' " (*Dishman*, *supra*, 269 F.3d at p. 981.) "California's common law tort remedy for an 'unreasonably intrusive' investigation that amount[ed] to an invasion of privacy" did not mandate employee benefit structures or their administration. (*Id*. at p. 982.) It also did not provide an alternative enforcement mechanism, because the plaintiff was not seeking a tort remedy to recover benefits he could not recover through ERISA. (*Dishman*, at p. 983.) The court rejected the defendant's argument that the claim related to the plan because the plan created the insurer-insured relationship without which there would have been no investigation of the disability claim. (*Ibid*.) The court concluded if that circumstance was sufficient to find that a state law was related to an ERISA plan, "a plan administrator could 'investigate' a claim in all manner of tortious ways with impunity." (*Dishman*, at p. 984.)

Although expressed in different language, the thrust of the *Dishman* decision seems to be similar to that of *Darcangelo*: the alleged misconduct did not occur in the normal course of processing of a claim for benefits or performing some other duty under the plan; rather it was undertaken in pursuit of an illegitimate or inappropriate end, through conduct that was entirely unrelated to and outside the scope of the administrator's or insurer's duties toward the plan. (See *Darcangelo*, *supra*, 292 F.3d at p. 193.)

In *Dishman*, the defendant's investigators attempted to collect damaging information about the plaintiff by nefarious means, which included misrepresentation and subterfuge, for a purpose unrelated to administration of the employee benefit plan. Here, in contrast, the evidence indicates defendant obtained information from plaintiff's health care providers in the course of case management of plaintiff's claim for benefits and

disclosed that information to plaintiff's employer. The plan documents authorized disclosure of information to designated representatives of the employer, and there was no evidence of disclosure to an unauthorized person or for a purpose outside the scope of plan administration. Plaintiff also alleged defendant failed to obtain informed consent from her before accessing her protected health information. Thus, plaintiff's claims raise such issues as whether and when the third-party administrator is required to obtain the plan participant's express consent before obtaining her health information, what information must be provided to the plan participant in order to obtain that consent, and to whom the information so obtained may be disclosed. These are issues governed by ERISA and the plan documents. The alleged misconduct does not constitute tortious conduct as defined under state law, that was entirely unrelated to and outside the scope of defendant's duties under the plan or bore only an attenuated relationship to the plan and its terms.

We conclude that, when, as in this case, a plaintiff asserts state law claims based on alleged misconduct that was within the scope of the conduct regulated by ERISA, including the privacy protections required to be included in ERISA group health plans, invoking state law remedies for that alleged misconduct constitutes an impermissible attempt to enforce ERISA privacy rights by means of an alternative enforcement mechanism; as to those claims, the state law provisions have an impermissible connection with ERISA plans and are therefore preempted.

Plaintiff cites *Gobeille* for the proposition that a state law may be preempted on the ground it has an impermissible connection with ERISA only when the state law governs a central matter of plan administration or interferes with nationally uniform plan administration. (*Gobeille, supra,* 136 S.Ct. at p. 943.) She asserts California's privacy laws do not govern a central matter of plan administration or interfere with nationally uniform plan administration, because they do not address "administration" of a plan. Plaintiff argues " 'administration' of an ERISA plan is an activity separate and distinct

from the 'management' of an ERISA plan." She contends "administration" concerns the provision of benefits to the plan's individual participants, and "management" concerns maintenance of the plan's overall fiscal health. Her premise is that defendant's motion and its supporting evidence showed that it obtained her protected health information and disclosed it to the plan administrator as part of the plan administrator's oversight of the plan's financial solvency.

Defendant's evidence indicated the plan administrator needed "access to detailed information in order to monitor Plan expenditures, benefit utilization and potential large claims which may substantially impact the Plan." Further, the plan administrator "acquires stop-loss insurance (re-insurance) coverage on an annual basis to protect the financial solvency of the Plan." The coverage varies with the plan's potential financial exposure to claims, and the plan sponsor must have access to claims information, including past and future claims costs, to evaluate that potential exposure.

Plaintiff argues: "While California's privacy laws might have an impact on how ERISA plans are *managed* (i.e., by limiting what private health information can be disseminated to those managing the plans' assets and financial condition), they do not impact how the plans are *administered* (i.e., by dictating how plan participants' benefits must be determined or provided)." We fail to see the distinction. Whether the plan administrator is "managing" the fiscal health of the plan or "administering" claims, California's privacy laws, if not preempted, would limit what private health information could be disseminated, to whom, and for what purpose. Plaintiff seems to be arguing that a state law would have an impermissible connection with ERISA plans and be preempted only if it affects provision of benefits to the plan's individual participants and not if it concerns maintenance of the plan's overall fiscal health. However, one of the objectives of ERISA was "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." (*Morash*, *supra*, 490 U.S. at p. 112.) In light of that objective and the breadth of the preemption

provision, we do not interpret the term "administer" as excluding all operations related to financial management of an ERISA plan.

Plaintiff has not cited us to any case in which a distinction between "management" and "administration" of an ERISA plan has been discussed or relied on by the court in determining the preemption issue. *Gobeille,* which plaintiff cites for its use of the term "administration," does not make such a distinction. In fact, at one point, it noted the third-party administrator "manages the 'processing, review, and payment' of claims" for the plan administrator. (*Gobeille, supra,* 136 S.Ct. at p. 942.)

Additionally, the "Plan Document and Summary Plan Description" includes obtaining stop-loss insurance as part of administration of the plan. It authorizes members of the employer's workforce who are permitted to receive protected health information to use that information "for purposes of Plan administrative functions." Plan administrative functions include health care operations, which "generally shall mean activities on behalf of the Plan that are related to … underwriting, premium rating and other functions related to obtaining or renewing an insurance contract, including stop-loss insurance." Thus, under the terms of the plan, "administrative functions" include functions related to obtaining or renewing stop-loss insurance.

We conclude plaintiff's attempt to distinguish use of protected health information for administrative, as opposed to management, purposes does not change the analysis of the preemption issue.

E. Exception for Criminal Laws

Plaintiff argues this case falls within an exception to ERISA preemption. The preemption statute provides that its preemption "shall not apply to any generally applicable criminal law of a State." (29 U.S.C. § 1144(b)(4).) She argues violation of Civil Code section 56.20 is a misdemeanor, it is a criminal law of general application, and therefore her claim under that statute is excepted from preemption.

We interpret the criminal law exception to ERISA preemption to permit criminal prosecution for violations of generally applicable criminal laws, even when committed by those involved in the operation of an ERISA plan and when committed in connection with carrying out their duties under the plan. This is not a criminal prosecution, however, so the exception does not apply. In light of "the ease with which states could circumvent" ERISA preemption, "the criminal law exemption to § 1144 cannot be interpreted to permit implied civil actions or remedies which otherwise would be preempted." (*Calhoon v. Bonnabel* (S.D.N.Y. 1982) 560 F.Supp. 101, 109; accord, *Pacific Bell v. Workers' Comp. Appeals Bd.* (1986) 186 Cal.App.3d 1603, 1615 ["ERISA's criminal law exemption from preemption does not authorize a state civil remedy that would otherwise be preempted by ERISA"].)

III. Sufficiency of Showing of Undisputed Facts

Plaintiff contends some of defendant's undisputed material facts were not established by defendant's evidence, either because the evidence did not support the statement of fact or because her objections to the evidence should have been sustained. Consequently, she asserts there were insufficient undisputed material facts to justify granting defendant's motion for summary judgment.

Defendant's separate statement of undisputed material facts presented 19 facts with supporting evidence. Plaintiff assumes all 19 were necessary in order to demonstrate defendant was entitled to judgment in its favor. She argues that, because defendant's facts were presented as "material" facts, if defendant's evidence failed to support even one of those facts, then its showing was insufficient, and the motion should not have been granted. Plaintiff challenges eight of defendant's facts, asserting they are not adequately supported by undisputed evidence. She has made no attempt, however, to show that all 19 facts in defendant's separate statement were actually material to the issue on which the motion was granted, or that, in the absence of the eight challenged facts, defendant's showing was insufficient.

Further, plaintiff has not established that the facts she challenges were not supported by admissible evidence. Plaintiff asserts two of defendant's facts (Nos. 9 and 10) were not supported by the citation to pages 67 through 69 of exhibit 1 to the declaration of Thomas Georgouses, because the declaration and exhibit only contained 32 pages. Facts Nos. 9 and 10 referred to provisions of the Plan Document and Summary Plan Description, which authorized disclosure of protected health information to certain of the plan administrator's employees. The plan document was presented as exhibit A to the declaration of Mike Casey. The Casey declaration identified the document by name and stated it was attached as exhibit A; the plan document included pages 67 through 69. Because the trial court referred to the plan document in its order, citing to "Declaration of Mike Casey, Ex. A, p. 67," it appears the trial court was not confused by the misdescription of the exhibit. Plaintiff makes no argument she was misled, in preparing her opposition to the motion, by the misdesignation of the exhibit.

Plaintiff also contends certain statements in facts Nos. 9 and 10 were not supported by the cited paragraph of Georgouses's declaration or were not based on his personal knowledge. The material facts, however, were supported by the citation to the plan document.

Plaintiff complains fact No. 12 is more detailed than the supporting declaration paragraph. She fails to explain how the additional information was material to the preemption issue.

Plaintiff contends fact No. 15 is not supported by the cited declarations. Fact No. 15 discussed provisions of the business associate agreement and third-party administration contract between defendant and Harris Farms, regarding disclosure by defendant of protected health information to specified persons at Harris Farms. This fact is similar to facts No. 9 and 10; to the extent it contains different information, plaintiff has not shown that the additional information is material to the preemption issue. Similarly, plaintiff challenges the statement in fact No. 16 that plaintiff was terminated

"for a work performance issue as well as supportive issues," on the ground it was not supported by the cited evidence. Plaintiff has not demonstrated that these alleged reasons for her termination were material to the issue of ERISA preemption.

Plaintiff asserts her objections to some of defendant's evidence should have been sustained by the trial court. We review rulings on evidentiary objections for abuse of discretion. (*Walker*, *supra*, 98 Cal.App.4th at p. 1169.) " 'The burden is on the party complaining to establish an abuse of discretion.' " (*Brawley v. J.C. Interiors, Inc***.** (2008) 161 Cal.App.4th 1126, 1138.)

Plaintiff objected to portions of declarations defendant cited in support of some of defendant's facts (Nos. 10, 11, and 17) on the ground they constituted inadmissible legal conclusions concerning legal duties. Plaintiff cites *Asplund v. Selected Investments in Financial Equities, Inc*. (2000) 86 Cal.App.4th 26, 50, which states: "It is well established that 'the question of the existence and scope of a defendant's duty is a legal question which depends on the nature of the … activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' [Citations.] It is equally well established ' "that experts may not give opinions on matters which are essentially within the province of the court to decide." ' "

More recently, in *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, the court upheld the trial court's ruling admitting the testimony of the CEO of a pension plan concerning tax regulations that applied to the pension plan as a tax qualified plan. (*Id*. at p. 572.) The trial court had admitted the CEO's opinions regarding whether the Internal Revenue Service (IRS) had regulations that recited what a tax qualified plan could do in the event of an error, whether the San Diego Municipal Code required the pension plan to follow IRS regulations, and the ramifications from the IRS if the pension plan did not collect in full the amounts overpaid to the plaintiff. (*Ibid*.) The court observed that, even if the "testimony could be characterized as lay opinion testimony, '[a] trial court has broad discretion to admit lay

opinion testimony.' " (*Id*. at p. 573.) Under Evidence Code section 800, lay opinion is admissible when it is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony. (*Krolikowski, supra,* at p. 573.) The court concluded the trial court reasonably could have concluded that, because of the CEO's position and because he was the person who implemented the IRS regulations at the pension plan, his testimony about the IRS regulations that applied to the pension plan was a matter within his own perception and was useful to an understanding of his testimony about the pension plan's practices and procedures. Accordingly, it was within the trial court's discretion to admit the CEO's testimony as lay opinion testimony. (*Ibid*.)

Plaintiff raised a legal conclusion objection to two statements made in the declaration of Thomas Georgouses, executive vice-president and legal counsel for defendant. The first stated: "The circumstance by which [defendant] has access and the manner in which [defendant] utilizes the [protected health information] of the participants and beneficiaries of the Plan is governed by the Plan Document and Summary Plan Description, the [Third Party Administration] Contract and the Mutual Business Associate Agreement." The second stated: "The information and services offered by [defendant] to Harris Farms, Inc., the Plan Administrator, facilitates [*sic*] the efficient and proper administration of the … Plan." Plaintiff objected on the same ground to one statement in the declaration of Mike Casey, vice-president of risk management and human resources at Harris Ranch Farms, Inc. Casey stated: "Some of the specific tasks that ERISA imposes on fiduciaries are oversight, funding and budgeting so as to ensure that the plan is financially solvent. To carry out these duties of the Plan Administrator, it is necessary that Harris Farms, Inc. have access to detailed information in order to monitor Plan expenditures, benefit utilization and potential large claims which may substantially impact the Plan."

The trial court overruled plaintiff's objections, rejecting her contention the testimony constituted legal conclusions. "Each declarant establishes his experience with

the company for which he works, and the particulars to which he testifies, and the 'legal conclusions' are simply statements of fact and factual descriptions within the realm of each man's job duties." We agree with the trial court that these are not legal conclusions; they also are not impermissible expert opinions regarding legal duties. The statements reflect matters within each witness's own perception, based on his position and his work in the operation of the plan, offered to explain the functioning of the plan, the plan administrator, and defendant. Plaintiff has not demonstrated any abuse of discretion in the trial court's overruling of these objections.

Finally, plaintiff challenged fact No. 18, which stated: "Case Management is an integral component in the administration of ERISA plans and is incorporated into almost all self-funded and fully funded health plans." Defendant cited a portion of the Georgouses declaration in support, but plaintiff contends Georgouses's deposition showed he lacked personal knowledge of the stated facts. Plaintiff has not demonstrated this was a material fact, however. Her own evidence indicated the nurse case management program was provided for in the Plan Document and Summary Plan Description. Whether the nurse case management program was an integral component in the administration of ERISA plans, or merely a convenient and useful tool that might be implemented in an appropriate case, it was part of the ERISA plan, and health information acquired through its use was subject to the privacy provisions applicable to ERISA plans. Plaintiff has not demonstrated the ERISA preemption rules would apply differently depending on whether or not the nurse case management program was an integral component in the administration of defendant's ERISA plan.

We conclude plaintiff has not demonstrated that any evidentiary objections should have been sustained; she also has not shown that the undisputed facts were insufficient to sustain the ruling on the motion for summary judgment or that there were triable issues of material fact that prevented granting defendant's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Defendant is entitled to its costs on appeal.

_____
HILL, P.J.

WE CONCUR:

_____
LEVY, J.

_____
PEÑA, J.